**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**CRIMINAL APPEAL No. 683 of 1999**

**For Approval and Signature:**

**HONOURABLE MR.JUSTICE A.L.DAVE**
**HONOURABLE MR.JUSTICE BANKIM.N.MEHTA**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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**HATUJI BACHUJI THAKORE - Appellant(s)**
**Versus**
**STATE OF GUJARAT - Opponent(s)**

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**Appearance :**
MR MHM SHAIKH for Appellant(s) : 1,
MR HM PRACHCHHAK, APP for Opponent(s) : 1,

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**CORAM : HONOURABLE MR.JUSTICE A.L.DAVE**

**and**

**HONOURABLE MR.JUSTICE BANKIM.N.MEHTA**

**Date : 30/08/2006**

**ORAL JUDGMENT**

**(Per : HONOURABLE MR.JUSTICE BANKIM.N.MEHTA)**

1. The appellant original accused No.1 Hatuji

Bachuji Thakor has preferred this appeal under Section 374 (2) of the Code of Criminal Procedure, 1973 and challenged the judgment dated 21-6-1999 passed by the learned Sessions Judge, Ahmedabad (Rural), at Mirzapur, Ahmedabad in Sessions Case No.42 of 1999 convicting him for the offence punishable under Section 302 of the I.P. Code and sentencing him to undergo life imprisonment and also convicting him for the offence punishable u/s 323 of the I.P. Code. and sentencing him to undergo simple imprisonment of one month and to pay fine of Rs.500/-, in default thereof, to undergo simple imprisonment for a period of eight days but acquitted for the offence punishable u/s 504 of the I.P. Code. Accused No. 2 Bachuji Shankerji Thakor is acquitted of all the offences charged against him.

2. In brief the prosecution case was that on 2-6-1998 complainant Geetaben Bhuraji and her husband were sitting in their court yard after

finishing their meal in Bhojiyapura village. At about eight O'clock in the evening appellant original accused No. 1 Hatuji Bachuji and original accused No.2 Bachuji Shankerji came near their house giving abuses. Bhuraji the husband of informant Geetaben asked appellant accused as to whom he was abusing. Therefore, appellant accused got instigated and inflicted one stick blow on head and another blow on forearm of Bhuraji who started bleeding from his head. Appellant accused gave a stick blow on the left thigh of Kantaben, the sister-in-law (wife of elder brother of the complainant) who tried to rescue Bhuraji. Co-accused Bhachuji Shankerji was instigating appellant accused by giving abuses.

3. On the basis of the First Information Report filed by Geetaben Bhuraji Thakor before Viramgam Rural Police Station offence was registered as I – CR No. 36 of 1998 for the offences punishable u/s 324, 323, 504 and 114

of the I.P. Code and investigation was started. Injured Bhuraji succumbed to the injuries during the investigation. Therefore, offence punishable u/s 302 of the I.P. Code was added in the First Information Report. During the investigation, the dead body of Bhuraji was sent for postmortem. The statements of the witnesses were recorded. Panchnama of scene of offence, panchnama of discovery of muddamal sticks and inquest panchanama were drawn. The accused named in F.I.R. were arrested and muddamal sticks were sent to F.S.L. for examination.

4. On completion of investigation, charge sheet was laid before the learned Judicial Magistrate, First Class, Viramgam for the offences punishable u/s 302, 323, 504 and 114 of the I.P. Code. As the offence was triable by the Court of Sessions, the case was committed to the Sessions Court, Ahmedabad (Rural), at Mirzapur, Ahmedabad and it was registered as Sessions Case No. 42 of 1999. Learned Sessions

Judge, Ahmedabad (Rural), at Mirzapur, Ahmedabad framed charge Exh.6 against accused for the offences punishable u/s 302, 323, 114 and 504 of the I.P. Code and the same was read over and explained to the accused who pleaded not guilty to the charge and claimed to be tried. Therefore, the prosecution adduced evidence. On completion of recording of evidence by prosecution the learned trial Judge explained to the accused the incriminating circumstances appearing against them in the evidence. The accused in their further statements recorded under Section 313 of the Cri. Procedure Code denied having committed the offence and stated that false case is filed against them.

5. After hearing the learned A.P.P. for the State and the learned advocate for the accused, the learned trial Judge found accused No. 1 Hatuji Bachuji guilty for the offences punishable under Section 302 and 323 of the I.P. Code and sentenced him as mentioned hereinabove but

acquitted him for the offence punishable u/s 504 of the I.P. Code. Whereas coaccused Bhachuji Shankerji was acquitted for the offences charged against him. Therefore, the convict has challenged the judgment and order of conviction in this appeal.

6. We have heard learned advocate Mr. MHM Shaikh for the appellant and learned A.P.P. Mr. H.M. Prachchhak for the respondent – State at length and in great detail. We have also perused the judgment and the record and proceeding of the case.

7. Mr. MHM Shaikh, learned advocate for appellant submitted that the evidence of so called eye witnesses is not reliable and their presence at the time of occurrence of the incident is doubtful. He also submitted that there is no medical evidence to indicate that P.W. 3 Kantaben also sustained injury in the same transaction and the medical evidence indicates

that only one blow was given to the deceased and therefore the learned trial Judge was not justified in recording conviction of appellant for the offence punishable u/s 302 of the I.P. Code. He further submitted that the manner in which the offence was committed appellant had no intention to cause death of Bhuraji and hence at the most appellant could have been convicted for the offence punishable u/s 304 Part-I or Part-II of the I.P. Code. In support of his arguments, he relied on the decisions in **Amu Mavji Khavas V. State of Gujarat reported in 1988 (1) G.L.R. 319** and **Jasram Vs. State of M.P., reported in (2006) 1 Supreme Court Cases (Cri.) 540**.

8. Learned A.P.P. Mr. H.M. Prachchhak appearing for the respondent – State vehemently opposed the appeal and submitted that the medical evidence indicates that the injuries were caused on vital part of the body and appellant attacked the victim with an intention and knowledge to

cause death and looking to the nature of the injuries it cannot be said that appellant had no intention to cause death of the deceased. He submitted that the presence of the witnesses is quite natural and the defence has not been able to bring out that their presence is not probable and therefore the learned trial Judge was justified in recording conviction of appellant. He also submitted that oral version with regard to the injury caused to P.W. 3 Kantaben indicates that she sustained injury in the same transaction and therefore no interference is warranted in the judgment of the trial court and consequently the appeal requires to be dismissed. In support of his arguments, he relied on the decisions in (i) **Abdul Vaheed Khan alias Waheed Vs. State of A.P.,** reported in **2005 Supreme Court Cases (Cri.) 1301** and (ii) in **Augustine Saldanha Vs. State of Karnataka reported in 2005 Supreme Court Cases (Cri.) 1313**.

9. In order to prove the charge levelled against

the accused the prosecution examined first informant P.W.1 Geetaben widow of Bhuraji at Exh. 10. She stated in her deposition that accused came giving abuses at about 8-00 p.m. when she and her husband were sitting on 'otla' of their house after taking meal. She further deposed that her husband asked them as to whom they were abusing, to which accused told him that they were abusing the deceased, and thereafter, appellant accused gave one stick blow on head and another blow on right shoulder of her husband. She also deposed that as she raised shouts her sister-in-law Kantaben came there and intervened, therefore, appellant – accused inflicted stick blow on her left thigh. In the cross-examination, she denied that her husband sustained injuries on account fall from 'otla'. Except that, there is no cross-examination with regard to the incident. On assessment of this deposition, it appears that appellant accused came to the house of the witness and on inquiry by Bhuraji husband of

the witness as to why the accused were giving abuses, appellant inflicted one stick blow on the head and another blow on the shoulder of deceased Bhuraji. It is true that there is no evidence with regard to giving abuses but it appears that the decased raised objection agaisnt the conduct of the appellant accused which appellant accused did not like and inflicted the injuries. It also appears from the evidence of this witness that someone had broken the liquor pots of the accused which instigated them and keeping grudge the accused attacked the deceased. The defence has not been able to elicit that the deceased sustained injuries on account of fall from 'otla'. In view of this evidence, in our opinion, the prosecution proved beyond reasonable doubt that appellant accused inflicted the injuries to the deceased and such injuries were given on vital part of the body which proved to be fatal.

10. The prosecution produced F.I.R. at Exh.11. On perusal of the F.I.R. it appears that the incident occurred at 8-00 p.m. on 2-6-1998. The evidence of P.S.O. of Viramgam Rural Police Station P.W. 9 Maganbhai Joitaram Exh. 23 who recorded the F.I.R. indicates that the F.I.R. was recorded at 3-30 a.m. on 3-6-1998. The witness is not cross-examined with regard to the time of recording of F.I.R. P.W. 1 Geetaben has explained the delay in filing of the F.I.R by explaining that she could not give information immediately after commission of offence to Viramgam as she could not get any vehicle as it was night time. The incident occurred in a small village near Viramgam. Therefore, the explanation cannot be thrown away as it is quite obvious that the informant must have taken some time to come to Viramgam to file the F.I.R. In view of this explanation, it cannot be said that there was unnecessary delay in filing the F.I.R.

11. The prosecution examined P.W. 11 Dr. Saumil Premchand Merchant at Exh. 32 the Doctor who performed postmortem. The witness deposed that the external injuries found on the dead body were recorded in Column No. 17 and internal injuries were recorded in Column No.20 of Postmortem Report Exh.33. He further deposed that the internal injuries were corresponding to the external injuries and the cause of death was shock as a result of head injuries sustained. He also deposed that such injuries were sufficient in the ordinary course of nature to cause death and the same were possible by muddamal articles No.4 and 5. There is no much cross-examination with regard to the injuries sustained by the deceased. The P.M. Report Exh. 33 indicates the injuries found on the dead body. It also indicates that cause of death was shock as a result of head injuries sustained by the deceased. The defence has not been able to demonstrate that such injuries were possible on account of fall from 'otla' or that the death was

accidental. In view of this evidence in our view the prosecution proved beyond reasonable doubt that Bhuraji died homicidal death.

12. The prosecution also examined P.W. 2 Madhuben Ishwarbhai at Exh. 12. The witness was 'Bhabhi' (wife of elder brother) of the deceased. The witness deposed about the injuries inflicted to the deceased Bhuraji as well as witness Kantaben by appellant accused. In the cross-examination, she stated that she was working in the house and reached at the place of the incident after five minutes of the incident and when she reached there Kantaben Bhuraji and Zenaji etc. were present. In view of this evidence, it becomes clear that the witness was not present at the time of occurrence of the incident but reached there after the incident was over. Therefore, no credence can be given to her deposition.

13. The prosecution also examined injured P.W. 3

Kantaben Arjanbhai at Exh. 13. The witness deposed with regard to the incident and injuries inflicted to the deceased. She also deposed that as she intervened appellant gave a stick blow on her left thigh. In the cross-examination, the witness deposed that she reached at the place of the incident within five minutes after occurrence. There is no evidence to indicate that she sustained injury on her left thigh as deposed by her. There is no medical evidence to indicate that the witness was treated for the injury allegedly sustained by her in the incident. On assessment of evidence of this witness it appears that she reached at the place after the incident was over. In our view, it is difficult to believe that the witness was present at the time of the incident and she was also injured in the incident. Therefore, the evidence of the witness cannot be relied on to connect appellant with the offence.

14. The prosecution examined P.W. 7

Bababhai Bhalabhai Exh. 20 to prove discovery panchanama Exh. 21. The panch has supported the panchanama but the witness did not identify the muddamal sticks shown to him during the trial. On the contrary, the witness denied that these were not the sticks recovered by the police.

15. The prosecution examined P.W. 8 Prahlad Ambaram the other panch to discovery panchanama at Exh. 22. The witness deposed that appellant accused took out muddamal article No.4 stick from pond and panchanama Exh. 21 was drawn. But deposition of this witness does not duly prove the discovery of muddamal article.

16. The prosecution produced inquest panchanama at Exh. 24 which is admitted by the defence. Therefore, the prosecution proved beyond reasonable doubt that there were injuries on the dead body.

17. The prosecution examined Investigating

Officer P.W. 10 Mohanbhai Chhaganbhai Patel at Exh. 25. The discovery panchamama Exh. 21 was drawn in the presence of this witness. There is no cross-examinataion with regard to discovery panchanama. Therefore, in our view, the prosecution duly proved the discovery panchanama Exh. 21. The defence has not been able to elicit that investigation has not been carried out properly by the Investigating Agency. Therefore, in our view, the prosecution duly proved beyond reasonable doubt the coplicity of appellant in the offence.

18. The prosecution produced F.S.L. Report at Exh. 31. It indicates that the muddamal stick was having blood stained marks of AB Group. After the incident deceased Bhuraji was covered with a cloth and it was blood stained. The F.S.L. report indicats that the cloth had AB group blood stained marks. In view of this, in our view, the prosecution proved beyond reasonable doubt that death of Bhuraji was caused by the use

of muddamal weapon stick.

19. In view of above evidence, in our view, the prosecution proved beyond reasonable doubt that deceased Bhuraji died on account of injuries sustained by stick blows inflicted by appellant. Therefore, now the only question remains to be considered is whether the case of appellant would fall u/s 304 Part-I or Part-II of the I.P. Code as culpable homicidal not amounting to murder ?

20. As discussed above, the evidence indicates that deceased and his wife Geetaben were sitting on 'otla' of their house after taking meal at night. The appellant accused came there armed with stick allegedly abusing deceased Bhuraji and when deceased questioned as to whom he was abusing, appellant inflicted one stick blow on the head and another stick blow on his shoulder. In view of this evidence, it becomes clear that appellant came to the house

of the deceased armed with stick and it can safely be inferred that appellant came to the house of the deceased with premeditation.

21. Under Section 300 of the I.P. Code, except in the cases excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or -

Secondly, if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or -

Thirdly if it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or -

Fourthly, if the person committing the

act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

22. In the case on hand, as discussed earlier appellant came at the house of the deceased armed with stick and inflicted injuries with the stick. The evidence also indicates that two stick blows were inflicted to the deceased out of which one blow was inflicted on vital part of the body. In view of this, it becomes clear that the injury was inflicted with the intention of causing death and the offender very well knew that such injury is likely to cause death. It also indicates that appellant knew that the head injury was sufficient in the ordinary course of nature to cause death and the injury is so eminently dangerous that it must in all probability likely to cause death.

In view of this, we are of the view that the case would not fall under any of the exceptions to Section 300 of the I.P. Code. The learned trial Judge was justified in convicting appellant for the offence of murder. The learned advocate for appellant has not been able to satisy us that conviction is required to be altered to conviction u/s 304 Part-I or Part-II of the I. P. Code. In the decision of **Amu Mavji Khavas (supra)**, the Court while pointing out the distinction between the offence punishable u/s 299, 300,302 and 304 Part-I and Part-II in the facts of the case held that **the accused had committed the offence punishable u/s 304 Part-I of the I.P. Code.** In the present case, the evidence indicates that appellant inflicted the injuries with predetermination and the learned advocate for the appellant failed to satisfy us that the case would fall under any of the exceptions to Section 300 of the I.P. Code. Therefore, said decision cannot be made applicable to the facts of the present case.

23. In the decision in Jasram (supra) Supreme Court on the facts held that **"there had been sudden quarrel and in the heat of passion appellant hit the deceased which resulted in her death."** In the present case, appellant has not been able to demonstrate that there had been sudden quarrel and in the heat of passion appellant inflicted the injury to deceased which resulted in his death. Therefore, the decision is also not applicable to the facts of the present case.

24. In the decision in **Abdul Waheed Khan alias Waheed And Others reported in 2005 Supreme Court Cases (Cri.) 1301**, while confirming the sentence u/s 302 of the I.P. Code Supreme Court held that "**stab wounds found to be sufficient in the normal course of nature to cause death, cl. thirdly of S. 300 attracted and conviction under S. 302 and not under S. 304 Pt. I would be justified."** As discussed earlier, the evidence

clearly indicates that stick blow was inflicted on the vital part of the deceased with the knowledge and intention to cause death. Therefore, in our view, the learned trial Judge was justified in convicting appellant for the offence punishable u/s 302 of the I.P. Code.

25. In the decision of Augustine Saldanha (supra), Supreme Court while comparing and distinguishing the provisions of Section 299, 300, 302 and 304 Part-I and II of the I.P.Code, held that even though single blow given with a heavy or dangerous weapon on a vital part of the body would make the offence a murder. In the present case, the medical evidence indicates that the injury was caused on the head with full force and therefore it cannot be said that the case would fall under Section 304 Part-I or Part-II of the I.P. Code.

26. For the conviction of the appellant u/s 323 of the I.P. Code, the prosecution did not

produce medical evidence to indicate that P.W. 3 Kantaben received injury in the same transaction. The evidence of P.W. 3 Kantaben also does not inspire any confidence. Under the circumstances, in our view, the learned trial Judge was not justified in recording the conviction of appellant u/s 323 of the I.P. Code.

27. In view of the above discussion, the appeal is allowed in part and the judgment and order dated 21-6-1999 passed by the learned Sessions Judge, Ahmedabad (Rural), at Mirzapur, Ahmedabad in Sessions Case No. 42 of 1999 convicting appellant - original accused No.1 Hatuji Bachuji Thakor for the offence punishable u/s 302 of the I. P. Code is confirmed and judgment and order recording the conviction of appellant for the offence punishable u/s 323 of the I.P. Code is set aside and appellant – original accused No.1 is acquitted for the offence punishable u/s 323 of the I.P. Code.

28. The muddamal article stick be disposed of as directed by the trial court.

(A.L. Dave, J.)

(Bankim N. Mehta,J.)

/JVSatwara/